No. 90-1468

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Supreme Court of the United States

October Term, 1990

MARY DETWILER,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT SUMMIT COUNTY, OHIO.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the criminal and appellate proceedings in the state courts were Petitioner, Mary Detwiler, as Defendant in the Akron Municipal Court and Appellant in the Court of Appeals, and the City of Akron and the State of Ohio, as Plaintiffs in the Akron Municipal Court and Appellees in the Court of Appeals.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

AKRON CITY CODE

§132.01 Disorderly conduct

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: . . .

(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act which serves no lawful and reasonable purpose of the offender; . . .

OHIO REVISED CODE

§2921.33 Resisting arrest

(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or another.

STATEMENT OF THE CASE

On November 15, 1989, a jury convicted Mary Joan Detwiler of Resisting Arrest, Disorderly Conduct and Criminal Trespass. Petitioner was one of 110 persons arrested and removed from the entrance to an abortion clinic where they conducted what they termed a "Rescue". Each of the Petitioner's co-defendants enterd pleas to Resisting Arrest and Criminal Trespass before trial and did not appeal. Petitioner appeals only her conviction of Criminal Trespass.

The facts are that Petitioner assembled with her co-defendants on Saturday, May 6, 1989, at a shopping mall parking lot. Petitioner was driven to 839 East Market Street in Akron where she and her co-defendants encircled an exterior staircase which was the public entrance to the clinic. Co-defendants also blocked a rear entrance to the clinic. The demonstrators managed to keep the clinic closed for five hours. The group at the front entrance spent most of the time seated on the ground. However, each time a patient attempted to gain entrance, upon command, the entire group stood and locked arms creating a human wall around the staircase. The group came equipped with two-way radios, bull horns, a mobile phone and three attorneys.

The group was asked to leave the area several times by the clinic manager and by a Police Captain who also warned the group of arrest. The police asked each protester individually to leave and each refused. Upon refusal to leave, the officers arrested the protester who in each case went limp and had to be picked up and carried away. Petitioner was the 67th person to be arrested. Each arrestee refused to give his or her name and none carried identification papers. Because of these organized

tactics, the police had to carry the defendants, place numbered plastic bracelets on their wrists and take fingerprints and photographs for the purpose of later identification.

The Petitioner was released the same day on a signature bond after she gave her name and address to the jail authorities.

At trial, the Petitioner testified that her purpose was to "save unborn children". Petitioner variously stated that purpose 20 times during her testimony.

Petitioner testified that she did not know before May 6, 1989, which clinic would be their target. Petitioner did not claim to know on May 6, 1989, that pregnancies beyond the first trimester were being terminated at that clinic on that day. Petitioner offered no testimony which indicated that she was aware of the particular circumstances of any of the patients who appeared at the clinic. Petitioner's proffer of evidence consisted of testimony and exhibits in support of her belief that life begins at fertilization. Petitioner proffered no evidence indicative of any unlawful conduct on the part of the clinic's personnel or patients.

The Ohio Ninth District Court of Appeals sustained the Petitioner's convictions and the Ohio Supreme Court declined jurisdiction for the reason that Petitioner failed to raise a substantial constitutional issue.

SUMMARY OF ARGUMENT

A trial court properly excludes evidence of an affirmative defense when a defendant cannot offer evidence on each element of the defense. The affirmative defense of necessity is not available to a political protester who is charged with criminal conduct where the protester cannot demonstrate a lack of reasonable legal alternatives or where the purported harm that the protester seeks to avoid is not unlawful.

The decisions of the courts below are consistent with the decision of this Court in *United States v. Bailey*, 444 U.S. 394 (1980). Petitioner does not cite to and Respondent has not located any appellate decision, federal or state, in conflict with the decision of the trial and appellate courts below.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURTS BELOW ON THE ISSUE OF THE DEFENSE OF NECESSITY IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, OF THE UNITED STATES COURTS OF APPEALS, OR OF ANY OF THE STATE COURTS OF LAST RESORT.

In the trial below, the Petitioner sought to raise the common law defense of necessity to the charge of criminal trespass and disorderly conduct. While recognizing necessity as an affirmative defense, the courts below held that, the Petitioner did not meet all of the elements of the defense and was therefore precluded from presenting evidence regarding her claimed defense of necessity.

For the purpose of considering the constitutional issue herein, the essential elements of the defense of necessity are that the defendant reasonably believed that her action was necessary to avoid an imminent harm, that there was no other reasonable legal alternative available to the defendant and that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of the harm. *United States v. Bailey,* 444 U.S. 394, 409-410 (1980); *United States v. Seward,* 687 F.2d 1270, 1273-1275 (10th Cir. 1982), *cert. denied,* 459 U.S. 1147 (1983); *United States v. Cassidy,* 616 F.2d 101 (4th Cir. 1979).

This Court considered the necessity defense in *United States v. Bailey,* 444 U.S. 394 (1980). In that case, the defendants escaped from a federal jail and were re-captured more than a month later. This Court approved the trial court's order to the jury to disregard the defendants' evidence concerning jail conditions, and

its refusal to instruct the jury on the defense of necessity where the defendants offered no evidence of one element of the defense, that being justification of continued absence.

> If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

Bailey, 444 U.S. at 416.

This Court has held that the Constitution does not guarantee a defendant in a criminal case the right to present any testimony that he or she desires. The defendant must be able to make some plausible showing of how the testimony would be both material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Cf. Moore v. Illinois*, 408 U.S. 786, 794 (1972), *reh'g denied*, 409 U.S. 897 (1972).

Underlying the proposition that juries should not be burdened with testimony not relevant to a permissible defense is the premise that it is not in the jury's province to decide what the law is or what it should be.

> . . . [A]s one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.

Sparf v. United States, 156 U.S. 51, 63 (1895); *See United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *Political Protest and the Illinois Defense of Necessity*, 54 U. Chi. L. Rev. 1070, 1087-1093 (1987); Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1183-1198 (1987).

One result of permitting juries to decide the applicable law in each case, would be to permit each jury to author the law as it deems fit. The Seventh Circuit Court of Appeals held that a defendant was not entitled to a jury instruction on his claimed defense of 'compulsion' for burning selective service records. *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971). Writing the opinion for the 7th Circuit, then Circuit Judge Stevens wrote as follows:

> If the defendant's theory of defenses were valid, the character of his conduct would not be judged by the rule of law but by the end which his means were designed to serve. His theory is merely another variety of an age old argument. If a religious, moral or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design.
>
> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

Cullen, 454 F.2d at 392 (citations omitted); *See Cox v. New Hampshire*, 312 U.S. 569 (1941); *Walker v. City of Birmingham*, 388 U.S. 307 (1967), *reh'g denied*, 389 U.S. 894 (1967).,

Petitioner cites no United States Circuit Court decision in conflict with the decision below. It is not for the Circuit Court's lack of consideration of the issue. The defense of necessity has been raised repeatedly by political protesters in the context of criminal offenses committed to protest war, nuclear energy and

armaments. The U.S. Circuit Courts of Appeals have consistently held that the defense of necessity is not available to political protesters who fail to prove one or more of the elements of that defense. *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985); *United States v. Montgomery*, 772 F.2d 733 (11th Cir. 1985); *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979); *See also, United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972). In each of the cases cited above, the Circuit Court approved the trial court's exclusion of testimony on necessity or justification defenses.

The availability of the defense of necessity to unlawful abortion protesters has been considered in the courts of several states. Petitioner has cited only one decision which supports her position—a decision from a trial court in Ohio. *Ohio v. Rinear*, No. 78 CRB-3706 (Mun. Ct., Hamilton County, Ohio, May 2, 1978). Two Ohio appellate courts (in addition to the one below), and virtually every other state court which has considered the issue, have agreed that the necessity defense is not available to unlawful abortion protesters. *City of Cleveland v. Sundermeir*, 48 Ohio App. 3d 204, 549 N.E.2d 561 (1989); *City of Kettering v. Berry*, 57 Ohio App. 3d 66, 567 N.E.2d 316 (1990); Annotation, *Trespass: State Prosecution for Unauthorized Entry or Occupation for Public Demonstration Purposes of Business, Industrial or Utility Premises*, 41 A.L.R. 4th 773.

The issue of the availability of the defense of necessity to criminal charges brought against abortion protesters has been before the court of last resort in six states and in each instance the necessity defense was precluded. *Oregon v. Clowes,* 310 Ore. 686, 801 P.2d 789 (1990); *Louisiana v. Aguillard,* 567 So. 2d 674 (La. Ct. App. 5th Cir. 1990), *writ denied,* 571 So. 2d 631 (La. 1990); *Wisconsin v. Migliorino,* 150 Wis. 2d 513, 442 N.W.2d 36 (1989), *cert. denied,* 110 U.S. 565 (1989); *Erlandson v. Texas,* 763 S.W.2d 845 (Tex. App. 14th Dist. 1988), *cert. denied,* 110 U.S. 152 (1989); *Pennsylvania v. Markum,* 541 A.2d 347 (Pa. Super. 1988), *appeal denied,* 520 Pa. 615, 554 A.2d 507 (1988), *cert. denied,* 489 U.S. 1080 (1989); *Bobo v. Texas,* 757 S.W.2d 58 (Tex. App. 14th Dist. 1988), *cert. denied,* 490 U.S. 1066 (1989); *Crabb v. Texas,* 754 S.W.2d 742 (Tex. App. 1st Dist. 1988), *cert. denied,* 110 U.S. 65 (1989); *Hoffart v. Texas,* 686 S.W.2d 259 (Tex. App. 14th Dist. 1985), *cert. denied,* 479 U.S. 824 (1986), *reh'g denied,* 479 U.S. 977 (1986); *Cleveland v. Municipality of Anchorage,* 631 P.2d 1073 (Alaska 1981).

In an additional six states and the District of Columbia, appellate courts have considered and rejected the use of the defense of necessity by abortion protesters who have been charged with criminal offenses. *Allison v. City of Birmingham,* 1991 Ala. Crim. App. LEXIS 83 (1991); *Missouri v. O'Brien,* 784 S.W.2d 187 (Mo. Ct. App. 1989); *Buckley v. City of Falls Church,* 371 S.E.2d 827 (Va. Ct. App. 1988); *Pursley v. Arkansas,* 21 Ark. App. 107, 730 S.W.2d 250 (1987); *Sigma Reproductive Health Center v. Maryland,* 297 Md. 660, 467 A.2d 483 (1983); *City of St. Louis v. Klocker,* 637 S.W.2d 174 (Mo. Ct. App. 1982); *Illinois v. Stiso,* 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981); *Illinois v. Krizka,* 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980); *Gaetano v. United States,* 406 A.2d 1291 (App.D.C. 1979).

In the instant case, the trial court found that Petitioner could not demontrate a lack of reasonable legal alternatives to her illegal conduct. This finding precludes the availability of a defense of necessity. *Bailey,* 444 U.S. at 416; *Kabat,* 797 F.2d at 591; *Dorrell,* 758 F.2d at 432; *Montgomery,* 772 F.2d at 738; *United States v. Quilty,* 741 F.2d 1031, 1033 (7th Cir. 1984); *Seward,* 687 F.2d at 1276; *Cassidy,* 616 F.2d at 102. The Eighth Circuit Court of Appeals noted in *Kabat* as follows:

> Nor was it relevant that the defendant . . . offered evidence that other protest activities and political efforts had been unavailing . . .; a lack of results might mean only that the will of the majority, legitimately expressed, had prevailed. The necessity defense was never intended to excuse criminal activity by those who disagree with the lawmaking branches of government.

Kabat, 797 F.2d at 591.

The trial court and appellate court below further held that the defense of necessity was not available in a criminal case where the perceived harm that Petitioner sought to avoid was not a legally recognized harm. The Courts of last resort in Alaska, Oregon, Wisconsin and Pennsylvania are all in accord with this holding. *Cleveland,* 631 P.2d at 1079; *Clowes,* 801 P.2d at 796; *Migliorino,* 442 N.W.2d at 47; *Markum,* 541 A.2d at 350.

Petitioner seeks to vest the jury with the authority to decide legal issues and political policy regardless of what the Constitution or the majority rule of the legislature has determined. Such a rule would be contrary to the principles of democracy and the precepts of organized society. *Sparf,* 156 U.S. 51; *Kabat,* 797 F.2d

580; *United States v. May*, 622 F.2d 1000 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980); *Cullen*, 454 F.2d 386; *Simpson*, 460 F.2d 515; *Moylan*, 417 F.2d 1002.

Almost 100 years ago, Justice Harlan warned of the dangers of permitting a jury to be the judge of the law as well as the facts of a case.

> Public and private safety would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried. . . . But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. . . . We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.

Sparf, 156 U.S. at 101-102.

The holdings of the courts below are consistent with the decisions of this Court and with the decisions of the Circuit Courts which have considered the issue of the political necessity defense. They are also consistent with the decisions of each of the state courts of last resort which have had occasion to consider the defense of necessity as raised by unlawful activities protesting abortion. There is no unresolved question of importance which merits this Court's attention.

II. THE QUESTION RAISED BY PETITIONER PRESUMES FACTS NOT IN THE RECORD BELOW.

Petitioner presents to this court the question of whether she had the right to raise the defense of necessity to criminal trespass charges by claiming a privilege "to save human life beyond the first trimester of pregnancy."

Petitioner overlooks her admission that, until she arrived at 839 East Market Street, she did not know what clinic she would be blockading. She made no claim in her testimony that she knew at the time of her trespass that abortions beyond the first trimester were to be performed at that clinic on that day. Petitioner did not offer that she knew the circumstances of any of the patients who appeared on May 6th. At trial, Petitioner professed her belief that life begins at conception and proffered evidence in support thereof.

Now the Petitioner attempts to frame her claimed privilege to trespass in a more limited scope by setting forth that she was attempting to save a life beyond the first trimester of pregnancy. Such was not the case in the trial below.

Petitioner is apparently more interested in placing the issue of abortion before this court than she is concerned about her conviction for criminal trespass. Respondent urges that it is not appropriate for this case to be remanded to a jury of eight persons to determine the issue of when life begins. Nor is it advisable that the parties to this action carry the burden of debating this ultimate question of humanity.

CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated any of the grounds set forth in Rule 10 of this Court for granting a petition for writ of certiorari. Petitioner has not identified an unresolved question of importance arising out of the prosecution of her criminal charges. Nor has she established a conflict between the lower courts in this case and the decisions of this Court or any other appellate court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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